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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
AT YAKIMA

STATE OF WASHINGTON, STATE OF  
COLORADO, STATE OF CONNECTICUT,  
STATE OF ILLINOIS, STATE OF  
MARYLAND, STATE OF MICHIGAN,  
STATE OF MINNESOTA, STATE OF  
NEVADA, STATE OF NEW MEXICO,  
STATE OF OREGON, STATE OF RHODE  
ISLAND, STATE OF VERMONT,  
COMMONWEALTH OF VIRGINIA, and  
STATE OF WISCONSIN,

NO. 1:20-cv-03127-SAB

DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
EXPEDITED DISCOVERY

Hearing Date: August 27, 2020

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity  
as President of the United States of America;  
UNITED STATES OF AMERICA; LOUIS  
DEJOY, in his official capacity as Postmaster  
General; UNITED STATES POSTAL  
SERVICE,

Defendants.

## 1 INTRODUCTION

2 Plaintiffs challenge several purported policy changes allegedly made by the  
3 United States Postal Service (Postal Service or USPS). Many of these changes are  
4 not policy changes at all, but are rather continuations of existing policies—most of  
5 which, by Plaintiffs’ admission, have been reversed or suspended until after the  
6 November Election. Despite the mountain of publicly available evidence on this  
7 issue, including two days of sworn testimony by the Postmaster General himself,  
8 Plaintiffs now seek expedited discovery before Defendants have had an opportunity  
9 to utter a word on the merits of Plaintiffs’ claims. The Court should deny Plaintiffs’  
10 request.

11 First, Plaintiffs have ignored the volume of information that the Postal Service  
12 has already provided or will imminently provide. This includes sworn testimony  
13 before the Senate and the House of Representatives, an update to Congress by the  
14 Postmaster General on the improvement of certain postal services that will be  
15 submitted on Monday, August 31, and declaration support that will be attached to  
16 Defendants’ forthcoming opposition to a preliminary injunction in a similar case  
17 pending before the Southern District of New York, which the court has ordered to be  
18 filed on or before September 8, 2020. In light of this information, Plaintiffs have not  
19 established what additional evidence they need, much less why any such evidence is  
20 needed on an expedited basis. Nor have they targeted the requests narrowly to support  
21 any potential preliminary injunction motion, as many of their requests are either  
22 overbroad (*i.e.*, they seek information not relevant to the November Election), or are  
23 duplicative of information they already have. Moreover, these requests come well  
24 before the ordinary time for discovery, and in advance of Defendants’ Rule 12  
25 response. Even at this early stage, however, Defendants have already identified  
26 several infirmities that could call this Court’s jurisdiction into doubt, including  
27 questions of standing and whether Plaintiffs have jurisdiction to bring some of their  
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1 statutory claims in district court. Discovery is not appropriate before these threshold  
 2 issues are resolved.

3 Plaintiffs also propound the extraordinary demand that Defendants be forced  
 4 to raise all potential objections to discovery *now*, well before the timeline set out in  
 5 the Federal Rules. There is no basis for such a demand and it should be disregarded  
 6 accordingly. Finally, even if this Court orders expedited discovery, it should provide  
 7 Defendants the full time specified under the Federal Rules to comply. Given the need  
 8 to conduct an investigation and the internal reviews required by discovery, the ten  
 9 days that Plaintiffs demand compliance in would be both impractical and unduly  
 10 burdensome.

11 **BACKGROUND**

12 On August 18, 2020, Plaintiffs, a coalition of states, filed suit against the United  
 13 States Postal Service, alleging a number of purported constitutional and statutory  
 14 violations concerning a series of alleged operational decisions that the Postal Service  
 15 made in the summer of 2020. *See generally* Compl., ECF No. 1. These decisions  
 16 have been the subject of considerable public scrutiny, including a hearing before the  
 17 Senate on August 21, 2020, and the House of Representatives on August 24, 2020.  
 18 And, as Plaintiffs acknowledge, many of these decisions have already been halted or  
 19 reversed. *See* Mot. for Expedited Discovery (“Discovery Mot.”), at 5, ECF No. 14.  
 20 In his testimony before the House Oversight and Reform Committee on August 23,  
 21 the Postmaster General “commit[ted] to give the committee an update on the  
 22 improvement of” certain postal services on Monday, August 31, 2020. Moreover,  
 23 these operational decisions are the subject of at least seven lawsuits across the  
 24 country. In one of these lawsuits, *Jones v. U.S. Postal Service*, No. 20-CV-6516  
 25 (S.D.N.Y. filed Aug. 17, 2020), the Court has already set a preliminary injunction  
 26 briefing schedule, with the Postal Service’s opposition (which will include declaration  
 27 support) to be filed on Tuesday, September 8, 2020. *See* Endorsed Order, ECF No.  
 28 15, No. 20-CV-6516 (S.D.N.Y. Aug. 25, 2020).

1 On the evening of August 21, 2020, Plaintiffs filed a motion seeking expedited  
2 discovery, Discovery Mot. They included, in an appendix to their motion, ten  
3 proposed interrogatories and two requests for production, and further requested that  
4 Defendants respond to the discovery within ten days of the Court’s order granting the  
5 motion. *See* Appendix, ECF No. 14-1. They further demanded that Defendants  
6 identify any objections to the proposed interrogatories in this response, *i.e.*, as  
7 opposed to at the time of production, as provided by the Federal Rules. *See* Discovery  
8 Mot. at 2. This Court has scheduled a hearing on the pending motion for August 27,  
9 2020. *See* Order Granting Plaintiffs’ Motion to Expedite, ECF No. 23 (Aug. 24,  
10 2020). In light of the considerable information that the Postal Service has already  
11 presented to Congress, and which it will soon present in an additional update to  
12 Congress and in its opposition in the Southern District of New York, Plaintiffs’  
13 motion for expedited discovery in this case is unwarranted.

## **STANDARD OF REVIEW**

15 “Rule 26(d) of the Federal Rules of Civil Procedure generally provides that  
16 formal discovery will not commence until after the parties have conferred as required  
17 by Rule 26(f).” *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1066 (C.D. Cal.  
18 2009) (quoting *Qwest Commc’ns Int’l Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D.  
19 418, 419 (D. Colo. 2003)). Nonetheless, “[c]ourts in the Ninth Circuit permit early  
20 discovery if the requesting party demonstrates good cause.” *MedImpact Healthcare*  
21 *Sys., Inc. v. IQVIA Holdings, Inc.*, No. 19-cv-1865-GPC-LL, 2019 WL 6310554, at  
22 \*2 (S.D. Cal. Nov. 25, 2019)). “Good cause exists where the need for expedited  
23 discovery, in consideration of the administration of justice, outweighs the prejudice  
24 to the responding party.” *In re Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp.  
25 2d 1160, 1179 (C.D. Cal. 2008) (internal citation and quotation marks omitted). The  
26 party seeking discovery bears the “burden of showing good cause for the requested  
27 departure from usual discovery procedures,” *Qwest Commc’ns Int’l*, 213 F.R.D. at  
28 419, bearing in mind that “[e]xpedited discovery is not the norm,” *Am. LegalNet*, 673

1 F.3d at 1066 (quoting *Merrill Lynch Pierce Fenner & Smith v. O'Connor*, 194 F.R.D.  
 2 618, 623 (N.D. Ill. 2000)).

3 “In determining whether good cause justifies expedited discovery, courts  
 4 commonly consider the following non-exhaustive factors: (1) whether a preliminary  
 5 injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for  
 6 requesting the expedited discovery; (4) the burden on the defendants to comply with  
 7 the requests; and (5) how far in advance of the typical discovery process the request  
 8 was made.” *MedImpact Healthcare Sys.*, 2019 WL 6310554, at \*2 (quoting *Am.*  
 9 *LegalNet*, 673 F. Supp. 2d at 1067)).

10 **ARGUMENT**

11 **I. Plaintiffs Have Failed To Show Good Cause Justifying Expedited  
 12 Discovery.**

13 Plaintiffs have failed to establish the good cause necessary to justify expedited  
 14 discovery. That is particularly so given the amount of information that has already  
 15 been released by the Postal Service (much of which overlaps with Plaintiffs’ requests  
 16 for discovery), or which is imminently going to be released.

17 *First*, “[p]laintiffs indicate that the purpose of the expedited discovery requests  
 18 is to determine whether they should move for preliminary injunction.” *MedImpact*  
 19 *Healthcare Sys.*, 2019 WL 6310554, at \*3. While “[t]he absence or presence of a  
 20 pending motion for preliminary injunction is not dispositive toward a finding of good  
 21 cause[,] . . . . [t]he fact that there is currently no pending motion for preliminary  
 22 injunction weighs against expedited discovery because its absence lessens the  
 23 urgency for early discovery.” *Id.*; *see also Am. LegalNet*, 674 F. Supp. 2d at 1066  
 24 (“expedited discovery is not automatically granted merely because a party seeks a  
 25 preliminary injunction”). Plaintiffs are, of course, entitled to file any motion they  
 26 deem appropriate, but their potential desire to do so in the future does not provide the  
 27 necessary good cause for discovery now. That is particularly so given they have made  
 28 no attempt to establish that the recent Congressional hearings and forthcoming update

1 and declaration(s) in opposition to another motion for preliminary injunction have not  
 2 provided them enough information to determine whether preliminary relief is  
 3 necessary. *See, e.g., Engelbrecht v. Experian Info. Servs., Inc.*, No. EDCV 12-01547-  
 4 VAP (OPx), 2012 WL 13202665, at \*2 (C.D. Cal. Nov. 16, 2012) (“[W]here a  
 5 plaintiff seeks expedited discovery to prepare for a preliminary injunction hearing, it  
 6 makes sense to examine the discovery request . . . on the entirety of the record to date  
 7 and the reasonableness of the request in light of all the surrounding circumstances.”)  
 8 (quoting *Merrill Lynch*, 194 F.R.D. at 624).

9 *Second*, Plaintiffs’ discovery requests are overly broad. While Defendants  
 10 have only had a limited opportunity to review the proposed discovery (as Plaintiffs’  
 11 motion was filed at the end of the day last Friday), it is apparent that these requests  
 12 extend beyond what might be necessary to support a preliminary injunction  
 13 preserving the status quo until the election. *See, e.g.*, Discovery Mot. at 9 (discussing  
 14 the potential harm “in the context of the impending election”). Plaintiffs seek, for  
 15 example, “a list or chart of all mail sorting or processing machines that were identified  
 16 for decommissioning and/or removal at any time on or after May 15, 2020.” *See*  
 17 Appendix, at 5. But machines that are identified for removal *but are not actually*  
 18 *removed until after the election* are irrelevant for any preliminary relief. They also  
 19 seek to know “whether any requests to reinstall removed or decommissioned  
 20 machines . . . have been denied,” *id.* at 6, without specifying *who* might have made  
 21 such a request or through what channel, and without explaining how this information  
 22 could support any of their claims. And, in some cases, they seek via interrogatory  
 23 information they acknowledge they already have, such as the fact that “the Postal  
 24 Service will not reinstall sorting machines that have been decommissioned.”  
 25 Discovery Mot. at 9. Nor have Plaintiffs made any attempt to adjust their requests in  
 26 light of the Postmaster General’s August 24 testimony before the House of  
 27 Representatives, in order to ensure that they *remain* narrowly tailored.  
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1        *Third*, the purposes of Plaintiffs’ proposed discovery is not appropriately  
 2 targeted. Plaintiffs assert that “the States only seek to determine whether and to what  
 3 extent DeJoy’s August 18 announcement is actually being implemented.” ECF No.  
 4 14-1 at 10. But these issues, again, were discussed at the Congressional hearings last  
 5 Friday and this Monday, and will be addressed as part of Defendants’ forthcoming  
 6 opposition to a preliminary injunction motion filed in the Southern District of New  
 7 York. There is no “good cause” that would justify expedited discovery for a plaintiff  
 8 to secure information that it has already (or will imminently) receive. *See, e.g.*,  
 9 *Engelbrecht*, 2012 WL 13202665, at \*4 (denying motion for expedited discovery  
 10 when relevant documents have already been submitted to the court). At a minimum,  
 11 Plaintiffs should review these sources of information to determine whether there  
 12 remains a need for discovery, and if so, to explain how the information they have yet  
 13 to receive is relevant.

14        *Fourth*, these requests would be unduly burdensome for Defendants. While  
 15 Defendants have not been fully able to evaluate burden at this early stage, Plaintiffs  
 16 seek, for example, detailed charts of “all processing and distribution centers and other  
 17 USPS facilities that were identified for full or partial capacity reductions,” Appendix,  
 18 at 6, without defining such terms. Plaintiffs also seek information that is not  
 19 maintained in an easily accessible, centralized database, such as information about  
 20 overtime and transportation practices, which are usually administered at the local  
 21 level. *See id.* at 7-8. (While Defendants may construe such an interrogatory as  
 22 applying only to national policies, if the Plaintiffs or Court disagrees with that  
 23 construction, the burden of complying with such a request would be considerable.).  
 24 Other requests may be addressable only after extensive data analysis. *See id.* at 5  
 25 (discussing a sought “list or chart”). More fundamentally, the requests are  
 26 burdensome because they are redundant. Much of the information that Plaintiffs seek  
 27 has been or likely will be provided in the near future, either to Congress or in parallel  
 28 litigation, but forcing the USPS to re-process and re-formulate the information (or

1 produce information that may be burdensome without an obvious benefit, such as  
 2 providing the location of specific mailboxes that are to be removed, if any, *id.* at 6)  
 3 imposes costs on Defendants without any appreciable benefit for Plaintiffs. That is  
 4 the definition of burdensome.

5 *Finally*, these requests come far before the time that discovery would normally  
 6 commence. Defendants were only served at the end of last week, and thus would  
 7 have nearly sixty days to file a responsive pleading under Rule 12. Moreover, while  
 8 Defendants are still studying the legal issues, they will likely have multiple threshold  
 9 arguments that may serve to preclude discovery. These include challenges to  
 10 Plaintiffs' standing, both because any future injuries to them with respect to the  
 11 November Election are too speculative, *see Clapper v. Amnesty Int'l USA*, 568 U.S.  
 12 368, 409 (2013), or because the States lack *parens patriae* standing to sue the federal  
 13 government on behalf of their citizens, *see Massachusetts v. Mellon*, 262 U.S. 447,  
 14 485 (1923). Plaintiffs also cannot bring a challenge to the Postal Service's  
 15 compliance with 39 U.S.C. § 3661, as such a challenge must be brought first to the  
 16 Postal Regulatory Commission, and then to the D.C. Circuit. *See* 39 U.S.C. §§ 3662,  
 17 3663. Without jurisdiction, the Court cannot take any action, including ordering  
 18 discovery. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without  
 19 jurisdiction the court cannot proceed at all in any cause," other than to "announc[e]  
 20 the fact and dismiss[] the cause.") (quoting *Ex parte McCardle*, 74 U.S. 506, 514  
 21 (1869)). Accordingly, at a minimum, the premature nature of this discovery request  
 22 counsels against granting Plaintiffs' motion. *Cf.* LCivR 16(b)(2) ("The Court may  
 23 delay the issuance of a scheduling order in those cases where . . . a motion to dismiss  
 24 has been filed, including motions based on lack of jurisdiction, failure to state a claim,  
 25 immunity of a defendant, the statute of limitations, or any other defense that would  
 26 caution against starting the discovery and pretrial processes.").

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1                   **II. Defendants Should Not Be Required To Object To Specific Discovery**  
 2                   **Requests At This Time.**

3                   Along with seeking an order requiring that Defendants complete their  
 4                   responses to pending discovery ten days after this Court rules on their motion for  
 5                   expedited discovery (itself one-third the time provided by the Federal Rules, *see* Fed.  
 6                   R. Civ. P. 33(b)(2), Fed. R. Civ. P. 34(b)(2)(A)), Plaintiffs state—without citation or  
 7                   argument—that “[t]o the extent Defendants have objections to the attached requests,  
 8                   they should be raised and adjudicated now.” ECF No. 14, at 2. They provide no legal  
 9                   authority for such a request, and there is none.

10                  Indeed, their demand is incompatible with the Rules of Civil Procedure. Federal  
 11                 Rule of Civil Procedure 33(b) provides 30 days for a party to serve answers *and*  
 12                 *objections* to any interrogatories, *i.e.*, to serve the objections at the same time as the  
 13                 affirmative response. *See* Fed. R. Civ. P. 33(b)(2); *see also* Fed. R. Civ. P.  
 14                 34(b)(2)(B) (same rule for requests for production). The Rules further provide that  
 15                  “[t]he grounds for objecting to an interrogatory must be stated with specificity,” and  
 16                 the failure to specifically object will ordinarily result in the objection being waived.  
 17                 Fed. R. Civ. P. 33(b)(4).

18                  This makes good sense: a party can only have a good-faith basis to object after  
 19                 they have had a fair opportunity to consult with their client and conduct a reasonable  
 20                 investigation in response to the served interrogatory. (Said differently, a party cannot  
 21                 properly determine if a request is unduly burdensome until they have assessed the  
 22                 burden of complying, or determine whether to object on the basis of privilege before  
 23                 they have identified whether a privilege is even applicable.) But a party cannot make  
 24                 such a determination at the very onset of preparing a discovery response – and they  
 25                 certainly cannot conduct such a good-faith inquiry in two business days, with the risk  
 26                 that an inadequate objection may inadvertently be waived. Indeed, even at this time,  
 27                 while Defendants have identified certain objectionable elements of Plaintiffs’  
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1 requests, they have not determined the full extent of their legal objections; nor are  
2 they required to do so. Plaintiffs provide no justification for their extraordinary  
3 demand.

4 **III. If this Court Grants Plaintiff's Motion, It Should Provide Defendants  
5 Additional Time To Prepare Their Discovery Responses.**

6 Plaintiffs have moved to require Defendants to complete their discovery  
7 responses only ten days after this Court enters an order permitting expedited  
8 discovery. This is only one-third the time provided by the Federal Rules, *see* Fed. R.  
9 Civ. P. 33(b)(2) & 34(b)(2)(A), and Plaintiffs do not explain the basis for such an  
10 expedited production.

11 Moreover, this schedule would prejudice Defendants. Defendants need to  
12 conduct a good-faith investigation in order to adequately respond to the  
13 interrogatories, and, to the extent there are any responsive documents, would also  
14 need to review those documents to ensure that they are relevant and non-privileged.  
15 Some of these requests will require the agency to conduct data analyses and  
16 processing before responsive information can be produced. *See, e.g.*, Appendix, at 5.  
17 These materials would also need to be internally reviewed, both at the USPS and at  
18 the Department of Justice. Such an investigation and review will take time,  
19 particularly considering parallel (but not necessarily completely overlapping)  
20 litigation in other cases, as well as Congressional requests for documents. Moreover,  
21 even to the extent that materials can be produced to Plaintiffs, Defendants will still  
22 need to determine whether a protective order would be required. And the Labor Day  
23 holiday may also limit the availability of individuals who would need to review any  
24 discovery responses.

25 Accordingly, Defendants respectfully request that if this Court does order  
26 expedited discovery, it provide Defendants the time permitted to respond as specified  
27 in the Federal Rules, *i.e.*, thirty days, or, at a minimum twenty-one days, in which to  
28 respond.

## **CONCLUSION**

For the aforementioned reasons, this Court should deny Plaintiffs' motion for expedited discovery and, if it does order expedited discovery, it should provide Defendants thirty days in which to comply with the requests and serve any objections.

Dated: August 25, 2020 Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 25<sup>th</sup> day of August, I electronically filed the foregoing Opposition with the Clerk by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 25, 2020

By: /s/ Joseph E. Borson  
Joseph E. Borson

## Counsel for Defendants